INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	3
Argument	6
1. Coverage	7
2. Exemption issue	9
Conclusion	10

CITATIONS

Cases:

Borden Co. v. *Borella*, 325 U.S. 679	7
Kirschbaum Co. v. *Walling*, 316 U.S. 517	7
Mitchell v. *Kentucky Finance Co.*, 359 U.S. 290	6, 9
Mitchell v. *H. B. Zachry Co.*, 362 U.S. 310	5, 7, 8
Roland Electrical Co. v. *Walling*, 326 U.S. 657	5, 7
10 East 40th Street Company v. *Callus*, 325 U.S. 578	7, 8
Wirtz v. *Modern Trashmoval, Inc.*, 323 F.2d 451, certiorari denied, 377 U.S. 925	7
Wirtz v. *Steepleton General Tire Company, Inc.*, 330 F. 2d 804, pending on a writ of certiorari, No. 755, this Term	7

Statutes:

Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended by 63 Stat. 910, and by 75 Stat. 65, 29 U.S.C. 201, *et seq.*:

§ 3(j)	8
§ 13(a)(2)	2, 3, 4
§ 13(a)(4)	2, 3, 4
§ 16(c)	3
§ 17	3

Miscellaneous: Page

95 Cong. Rec. 14874 8
95 Cong. Rec. 14875 8
95 Cong. Rec. 14928 8
95 Cong. Rec. 14929 8

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 754

IDAHO SHEET METAL WORKS, INC., PETITIONER

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals in these consolidated actions (Nos. 18887 and 18888 in the court of appeals) (App. C to Pet.) is reported at 335 F.2d 952. The findings, conclusions and opinion of the district court (1 R. 52-57, 58-61; 2 R. 18-23, 24-27)[1] are not reported.[2]

---

[1] The references 1 R, 2 R. and 3 R. are to the respective volumes of the transcript of the Record filed in this Court.

[2] The district court opinion reproduced in Appendix A, pp. 18-19, of the petition is not an opinion in this case, but in a

JURISDICTION

The judgments of the court of appeals (1R. 83-84) were entered on August 10, 1964. A timely petition for rehearing was denied on September 15, 1964 (1 R. 85-95). The petition for a writ of certiorari was filed on December 11, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether employees who regularly fabricate, install and repair sheet metal equipment for use in customers' manufacturing plants in the production of goods for interstate commerce are engaged in the production of goods for commerce within the coverage of the Fair Labor Standards Act.

2. Whether a sheet metal plant engaged primarily in fabricating, installing and repairing equipment for customers' manufacturing plants is a "retail or service establishment" within the exemption provided by Section 13(a)(2) and (4) of the Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended by the Fair Labor Standards Act Amendments of 1949, 63 Stat. 910, and by the Act of May 5, 1961, 75 Stat. 65 (29 U.S.C. 201, *et seq.*), are printed in the petition for certiorari (Pet. 20-21).

---

similar case, *Wirtz* v. *Higgins, Inc.*, which, by agreement of the parties, was disposed of on appeal in accordance with the decision of the court of appeals in the present case.

STATEMENT

This case involves two consolidated actions brought by the Secretary of Labor under the Fair Labor Standards Act—one seeking an injunction under Section 17 of the Act to restrain further violations by petitioner of the Act's overtime requirements, and the other instituted under Section 16(c) to recover unpaid overtime compensation on behalf of one of petitioner's employees. Petitioner admittedly did not pay its employees in accordance with the overtime requirements of the Act (1 R. 27, 42-43). It contended, however, that the employees were not within the coverage of the Act and that, in any event, the business was a "retail or service establishment" entitled to exemption under Section 13(a)(2) and (4) of the Act (1 R. 8-9).

1. Petitioner operates a plant in Burley, Idaho, where it employs some twelve workers in fabricating, installing and repairing sheet metal products (1 R. 30; 3 R. 31-35, 44; App. C, p. 4). Although petitioner does some fabrication work for small businesses and individuals, and, as an "incidental," sells small stock items (3 R. 45), about 83% of its gross income during the years 1959 through 1961 ($563,035 out of a total of $673,808) was derived from the fabrication, installation and maintenance of equipment for five large potato processors in the Burley area (1 R. 31-36; App. C, p. 4). Petitioner's employees, during many workweeks, spent a substantial part of their time working on equipment—such as vats, storage tanks, elevator buckets, and chutes—

which is made to order in accordance with the plans and specifications of the particular processor and used in the production of dehydrated and frozen potatoes for interstate shipment (1 R. 31-36; App. C, p. 4). Some of this work, both fabrication and installation, was performed in the customers' plants, and on such occasions, petitioner's employees would work alongside the customers' employees, under the same supervision (3 R. 23-24; App. C, p. 5).

In addition to the 83% of its income derived from the work for the five potato processors, petitioner derived another 3% of its income from comparable work performed for five other interstate producers engaged in the manufacture or processing of sugar, flour and millfeed, seeds and containers (1 R. 36-39; App. C, p. 4).

2. Petitioner's claim to exemption as a "retail or service establishment" under Section 13(a)(2) and (4) of the Act rested upon the testimony of its lawyer-accountant, its general manager, its president and two salesmen who sell metal products to it (3 R. 67-97), to the effect that they considered establishments such as petitioner's to be "custom retail and service establishments" (3 R. 73). The lawyer-accountant explained that his view was based on the belief that such establishments evolved from the "early tin shop" found in hardware stores around 1900 (3 R. 68-72), although he acknowledged that there are "marked differences" between petitioner's operation and that of the traditional tin shop, in that the former is "immensely larger" and its product "larger in size and much higher in price" (3 R. 75). Petitioner's presi-

dent testified that he regarded his business as "retail" because "[e]very job we do is to the customer's specific recommendations and to his personal use" (3 R. 50), and because 60% of his sales (in number, not in dollar volume) is to "the general public" as distinguished from industrial customers (3 R. 64-65). The other three witnesses gave no explanation of the basis for their views (3 R. 80, 89-90, 94-95).

3. The district court upheld petitioner's contention that the work performed for the interstate producers did not bring its employees within the Act's coverage, citing *Mitchell* v. *H. B. Zachry Co.*, 362 U.S. 310 (1 R. 54-55). It also sustained petitioner's claim to exemption as a "retail or service establishment" on the basis of its finding that petitioner's business was so recognized in the industry "as shown by the testimony of the manager of defendant corporation and representatives of companies selling materials to defendant" (1 R. 56, 61). It declined to follow this Court's decision in *Roland Electrical Co.* v. *Walling*, 326 U.S. 657, noting that its description of the "retail concept" was "repudiated by the 1949 amendment to the Act" (1 R. 56).

The court of appeals reversed on both issues (App. C). On the coverage issue, it relied on the *Roland* decision and on legislative history showing "beyond doubt that the holding in Roland that those employees were * * * within the coverage of the Act, would not be affected by the 1949 amendment" (App. C, pp. 9-10).

On the exemption question, the court, citing *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, treated as irrelevant the testimony of petitioner's witnesses to the effect that the business was considered "retail" in the industry, and ruled instead that the case was governed by the holding in *Roland* that the exemption is not applicable to the business of selling industrial goods and services to manufacturers producing goods for commerce. On the basis of the legislative history, the court below further noted that the 1949 amendment was not intended to repudiate the *Roland* holding, or to extend the traditional "retail concept" to types of businesses not previously covered by it, but merely to do away with the "business use" test whereby any sale of goods or services for use in the customer's business was *ipso facto* deemed non-retail. The court concluded that petitioner's business, like the similar enterprise in *Roland* and like the small loan business in *Kentucky Finance*, *supra*, was "outside the retail concept" of the Act independently of the rejected "business use" test, and, therefore, could not be classified as retail under the 1949 amendment.

ARGUMENT

The decision below, on both the coverage and exemption issues, correctly applies the governing principles and is in accord with the Congressional intent as disclosed by the relevant legislative history. On the coverage issue, the decision is not in conflict with that of any other court of appeals and presents no problem warranting review by this Court. On the ex-

emption issue, however, there is a fundamental conflict between the present decision and the decisions of the Fourth and Sixth Circuits, respectively, in *Wirtz* v. *Modern Trashmoval, Inc.*, 323 F. 2d 451, certiorari denied, 377 U.S. 925, and in *Wirtz* v. *Steepleton General Tire Company, Inc.*, 330 F. 2d 804, in which a petition for writ of certiorari, filed on behalf of the Secretary of Labor, is now pending before this Court (No. 755, this Term). Accordingly, on the exemption issue, we do not oppose the granting of the writ.

1. *Coverage.* The decision below is supported by this Court's decisions in *Roland Electrical Co.* v. *Walling*, 326 U.S. 657; *Kirschbaum Co.* v. *Walling*, 316 U.S. 517; and *Borden Co.* v. *Borella*, 325 U.S. 679, and is entirely consistent with *Mitchell* v. *H. B. Zachry Co.*, 362 U.S. 310, and *10 East 40th Street Company* v. *Callus*, 325 U.S. 578. Far from being "squarely in conflict" with the decision below (Pet. 7), the *Roland*, *Kirschbaum* and *Borden* decisions plainly establish that employees making, maintaining, or repairing equipment for direct use in production facilities producing goods for interstate shipment are within the Act's coverage. Those decisions also make clear that such employees are covered whether they are employed by the interstate producer himself or by an independent establishment serving both interstate and local uses.

The *Roland* decision (as well as *Kirschbaum*, *Borden* and others to similar effect) was specifically approved in the Senate conference report explaining the 1949 amendment to the Act's definition of "pro-